IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 76-380

GEORGE W. GINO and EMILIE R. GINO,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEPHEN J. POLLAK
JOHN TOWNSEND RICH
LOUIS M. KAUDER
SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

STEPHEN M. NASSAU
1201 Sixteenth Street, N.W.
Washington, D.C. 20036

LAWRENCE B. TRYGSTAD
TRYGSTAD & ODELL
1880 Century Park East
Suite 517
Century City, California 90067

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

September 14, 1976

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

GEORGE W. GINO and EMILIE R. GINO,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in this action on June 16, 1976, reversing a decision of the United States Tax Court.

OPINIONS BELOW

The *per curiam* opinion of the court of appeals, not yet officially reported, is attached hereto as Appendix A, pp. 1a-5a *infra*, and is unofficially reported at 76-2 CCH U.S.T.C. ¶ 9528. The findings of fact and opinion of the United States Tax Court, officially reported at 60 T.C. 304 (1973), are attached hereto as Appendix B, pp. 6a-23a *infra*.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1976. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1970).

QUESTIONS PRESENTED

(1) Whether the pecentage of home-office expenses allowable to taxpayers as a business expense deduction under Section 162(a) of the Internal Revenue Code of 1954 is properly determined (a) by dividing the number of hours per day that the space is used for business purposes by twenty-four, the number of hours that the Commissioner contends the space is *available* for all uses, or (b) by dividing the number of hours that the space is used for business purposes by the number of hours it is *actually used* for all purposes, as the Tax Court concluded.

(2) Whether the court of appeals, in reversing the Tax Court decision on the above-stated question, improperly deferred to the Commissioner's position and thereby misapplied this Court's decision in *United States* v. *Correll*, 389 U.S. 299 (1967).

STATUTES AND REGULATIONS INVOLVED

Section 162(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 162(a) (1970), provides: "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *."

Section 262 of the Internal Revenue Code of 1954, 26 U.S.C. § 262 (1970), provides: "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses."

Treasury Regulations § 1.262-1(b), 26 C.F.R. (1976), provides:

> "(b) *Examples of personal, living, and family expenses.* Personal, living, and family expenses are illustrated in the following examples:
>
> "* * * *
>
> "(3) Expenses of maintaining a household, including amounts paid for rent, water, utilities, domestic service, and the like, are not deductible. A taxpayer who rents a property for residential purposes, but incidentally conducts business there (his place of business being elsewhere) shall not deduct any part of the rent. If, however, he uses part of the house as his place of business, such portion of the rent and other similar expenses as is properly attributable to such place of business is deductible as a business expense."

Treasury Regulations § 1.274-2(e)(4), 26 C.F.R. (1976), also involved in the case, is quoted in context in Appendix C, pp. 24a-27a *infra*.

Section 7482(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 7482(a) (1970), provides: "The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court * * *, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; * * *."

Section 7805(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 7805(a) (1970), provides: "[T]he Secretary or his delegate shall prescribe all needful rules and regulations for the enforcement of this title * * *."

STATEMENT OF THE CASE

A. Statement of Facts

The relevant facts, essentially undisputed throughout this litigation, may be summarized as follows:

Petitioners George W. and Emilie R. Gino are husband and wife, both of whom are high school teachers employed by the Los Angeles City school system during the years at issue, 1966-68. During those years, both petitioners performed non-classroom duties at home in connection with their employment. Each spent approximately two hours a night, five days a week, preparing lesson plans, preparing and grading examinations, and reading professional materials. In addition, part of their home was used for storing of their professional library, consisting of over 200 books, and other teaching materials.

During the years at issue, petitioners lived in three different apartments. The first consisted of a bedroom, living room, and kitchen; petitioners used 20 percent of the space (including the dining room table in the living room and the kitchen table) in connection with their teaching activities. The second consisted of a bedroom, living room, dining area, kitchen, and den; petitioners used 25 percent of the space for teaching activities. The third consisted of two bedrooms, a living room, dining area, kitchen and den; petitioners used 33⅓ percent of the space for teaching activities.

The "working areas" were not segregated in any of the apartments; they were regularly used for nonteaching as well as teaching activities. The Tax Court found the record to show that the work areas were actually in use, for all purposes, approximately eight hours a day. App. B, page 22a, *infra*.

On their 1966, 1967, and 1968 returns, petitioners claimed deductions in the amounts of $500, $630, and

$1000 as business expenses attributable to their "home offices."

B. The Deductions Allowed by the Commissioner

The Commissioner allowed only a portion of each office-in-the-home deduction. In computing the deductions allowed (see App. B, page 17a *infra*), the Commissioner took the amount of time each day that the rooms were used for business purposes, here two hours, and divided by twenty-four, the total number of hours in the day. The expenses attributable to the work areas—the amounts of utilities and rent expenditures multiplied by the appropriate percentages of space (20%, 25% and 33⅓%)—were then reduced by being multiplied by the resulting fraction, 2/24.

In so computing the allowable deduction, the Commissioner followed the practice he had announced in Revenue Ruling 62-180, 1962-2 Cum. Bull. 52. Part of that ruling reads:

> "Where a portion of a residence is devoted to business purposes on a regular basis, the portion of the depreciation and other costs incurred in maintaining the residence, which is properly attributable to the space used in business, is a question of fact to be decided in each case. However, in making an allocation of expenses, it would, if the circumstances warrant, be proper to compare the number of rooms or square feet of space devoted to a business purpose to the total number of rooms or square feet in the residence * * *. * * * Any other method which is reasonable under the circumstances will be acceptable.
>
> "Where a portion of the residence is regularly used for business purposes only part of the time, a further allocation must be made on the basis of the ratio of the time the area is actually used for busi-

ness purposes to the total time it is available for all uses. See Example (5) below.

"* * * *

"*Example (5).* As a condition of his employment, *E*, an outside salesman, is required to do his clerical work on his own time and away from the company office. He does this work at his residence which he rents. * * * He uses the den as an office. The den is also available for family use. He uses the den for business purposes an average of two hours per day. Therefore, two twenty-fourths of the expense allocable to the den is deductible as business expenses. * * *"

Thus, while the declaratory part of the ruling announces only that the denominator for the fraction shall be "the total time it is available for all uses," the example indicates that the Commissioner construes these words to mean, in the usual case, twenty-four hours a day for any portion of a residence. The Commissioner sought to apply that interpretation in this case.[1]

C. The Tax Court Decision

The United States Tax Court rejected the Commissioner's method of computation, finding that the proper allocation fraction was 2/8 rather than 2/24. The court (Honorable Cynthia Hall) filed its findings of fact and its unreviewed opinion on May 31, 1973, 60 T.C. 304 (App. B, page 6a *infra*), and its decision was entered on October 1, 1973 (App. D, page 28a *infra*).[2]

---

[1] Although the Commissioner has attempted to limit the deductibility of office-in-the-home expenses to cases where such an office is a "condition of employment," *e.g.*, Rev. Rul. 62-180, the Commissioner conceded in this case that petitioners shall be considered to have met that requirement.

[2] Two unrelated issues in the Tax Court were resolved in favor of the Commissioner and are no longer in the case.

The court noted that it had previously ruled, with the subsequent acquiescence of the Commissioner, that where combined business and residence premises remain unoccupied for long periods of time while the taxpayer is away from the city, the Commissioner may not compute the allocation percentage by comparing the days of business use of the premises with the total number of days that the premises were "available," whether occupied or not. The relevant period "was the total period of actual use of the premises" while the taxpayer was present in the city. *International Artists, Ltd.* v. *Commissioner*, 55 T.C. 94, 107 (1970), acquiesced, 1971-2 Cum. Bull. 3.

Similarly, the court found a useful analogy in Section 1.274-2(e)(4) of the Regulations (App. C, page 24a *infra*). Under that regulation, in determining whether the primary use of facilities such as airplanes, yachts, lodges or cottages is for business or personal purposes, "it is the *actual use* of the facility which establishes the deductibility of expenditures with respect to the facility; not its *availability for use.*" (Emphasis added.)

Accordingly, the court held that "the proper ratio to apply is the ratio of hours of business use to hours of total use of the rooms in issue in petitioners' apartment or condominium." App. B, pages 20a-21a *infra*. The relevant portion of Revenue Ruling 62-180 was disapproved in the following words:

> "The obvious difficulty with an allocation of business use as a percentage of total hours of availability for use rather than total hours of use, is the erroneous and distorting assumption that a dual-use facility is not, when unused, just as much available for business as it is for nonbusiness use. The correct rule is to prorate in proportion to actual use * * * without the thumb on the scales provided by the allocation to personal use of all hours of nonuse." App. B, page 21a *infra*.

In a footnote, the court distinguished its own reliance on Revenue Ruling 62-180 in an unreported decision, *Henderson* v. *Commissioner*, 27 CCH Tax Ct. Mem. 109 (1968), since in that case the taxpayer spent substantially all of her time in a one-room "efficiency" apartment. "Under such circumstances the apartment was in use, either for business or personal purposes, substantially all the time, and the Rev. Rul. 62-180 allocation method reaches the same result as the method we have herein applied." App. B, page 21a *infra*.

The "work areas" in petitioners' apartment—which did not include any bedroom—were actually in use, for all purposes, approximately eight hours a day, two hours of which went to teaching activities. Accordingly, the court concluded:

> "[A] more reasonable fraction to apply is 2/8 rather than the 2/24 employed by the respondent. Based on all the facts and circumstances, taking into account weekends, holidays, and vacations on which the testimony was imprecise on the one hand, and the use of part of the apartment and condominiums for permanent storage of work-connected materials on the other, we hold that 25 percent of the housing costs allocable to the work-at-home areas is deductible. We recognize the allocations of this type are necessarily imprecise, but they are required if justice is to be served." App. B, page 22a *infra*.

D. The Court of Appeals Decision

The Commissioner appealed the adverse decision of the Tax Court, and the Court of Appeals for the Ninth

---

[3] The court noted, in addition, that it did not agree with the unreported case of *Hoggard* v. *United States*, 67-2 CCH U.S.T.C. ¶ 9741 (E.D. Va. 1967), in which the time-allocation rule of Rev. Rul. 62-180 was applied without discussion of its fairness or administrative necessity.

Circuit reversed, in a *per curiam* opinion (Duniway, Carter, and Trask, JJ.). App. A, pages 1a-5a *infra*.

The court briefly rejected the anology to Section 1.274-2(e)(4) of the Regulations as inapplicable. It quoted Example (5) from Revenue Ruling 62-180 (see page 6 *supra*) and found that it "relates closely to the situation here." Having cited that ruling, the court decided that there was no need to go further.

> "Where a revenue ruling has been published by the Internal Revenue Service for the purpose of solving this particular problem, such as the ruling relied upon here by appellant, considerations of fair and effective administration of the tax law persuade us to the Commissioner's view, particularly in a close case. As the Supreme Court said in *United States* v. *Correll*, 389 U.S. 299, 306-07 (1967):
>
> > 'Alternatives to the Commissioner's . . . rule are of course available. Improvements might be imagined. But we do not sit as a Committee of revision to perfect the administration of the tax laws. Congress has delegated to the Commissioner, not to the courts, the task of prescribing "all needful rules and regulations for the enforcement" of the Internal Revenue Code. 26 U.S.C. § 7805(a). In this area of limitless factual variation, "it is the province of Congress and the Commissioner, not the courts, to make the appropriate adjustments." *Commissioner* v. *Stidger*, 386 U.S. 287. The role of the judiciary in cases of this sort begins and ends with assuring that the Commissioner's regulations fall within his authority to implement the congressional mandate in some reasonable manner.'
>
> "We are persuaded that the better course is to follow the rule established by the Commissioner. The decision of the Tax Court is reversed." App. A, pages 4a-5a *infra*.

REASONS FOR GRANTING THE WRIT

The court of appeals in this case decided a broadly applicable question of federal income tax law in a manner not in accord with the policies of judicial review in tax cases long recognized by this Court. The Tax Court, when confronted with the Commissioner's argument for the time-allocation rule that appears in Revenue Ruling 62-180, considered the facts carefully and held that the Commissioner's approach was neither a fair nor a reasonable construction of the tax code—not just in this particular case, but in the large class of office-in-the-home cases of which the instant case is typical. The court of appeals reversed, basing its ruling, for all appearances, not on its own analysis of the Code and the reasonableness of the Tax Court's approach, but on the ground that in such cases the "better course" was to follow the rule established by the Commissioner. The result was the reversal of a Tax Court decision that reached a construction of the Code more reasonable and equitable than the Commissioner's approach and no less consistent with efficient administration of the tax laws. Accordingly, the court of appeals decision to follow the Commissioner's policy in this case reflects a dangerously erroneous view of the function of federal courts in reviewing decisions of the United States Tax Court.

This Court described the role of the Tax Court in *McDonald* v. *Commissioner*, 323 U.S. 57, 64 (1944) (Frankfurter, J.):

> "[The Tax Court] of necessity must be the main agency for nation-wide supervision of tax administration. Whatever the statutory or practical limitations upon the exercise of its authority, Congress has plainly designed that tribunal to serve, as it were, as the exchequer court of the country."

Earlier, in *Dobson* v. *Commissioner*, 320 U.S. 489, 498-99 (1943) (Jackson, J.), the Court had given some of the

practical reasons for respecting the decisions of the Tax Court:

> "The court is independent, and its neutrality is not clouded by prosecuting duties. Its procedures assure fair hearings. Its deliberations are evidenced by careful opinions. All guides to judgment available to judges are habitually consulted and respected. It has established a tradition of freedom from bias and pressures. It deals with a subject that is highly specialized and so complex as to be the despair of judges. * * * Its members not infrequently bring to their task long legislative or administrative experience in their subject. The volume of tax matters flowing through the Tax Court keeps its members abreast of changing statutes, regulations, and Bureau practices, informed as to the background of controversies and aware of the impact of their decisions on both Treasury and taxpayer. * * * Tested by every theoretical and practical reason for administrative finality, no administrative decisions are entitled to higher credit in the courts. Consideration of uniform and expeditious tax administrations require that they be given all credit to which they are entitled under the law." (Footnotes omitted.)[4]

---

[4] The *Dobson* decision is no longer the law insofar as it ordained a greater weight to be attached to the findings of the Tax Court than to those of any other fact-finder in a tax litigation. See *Commissioner* v. *Duberstein*, 363 U.S. 278, 289-90 n. 11, and 291 n. 13 (1960) (Brennan, J.) (discussing the 1948 amendment to § 1141(a) of the 1939 Code, now § 7482(a) of the 1954 Code). The Court in *Duberstein*, however, approved *Dobson's* emphasis upon the importance of factual inquiry in tax cases, 363 U.S. at 290 (n. 11), and said, in words that highlight the role of the Tax Court:

> "Decision of the issue presented in these cases [involving the definition of "gifts" excludable from income] must be based ultimately on the application of the factfinding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case. The nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of rele-

And in *Commissioner* v. *Sunnen*, 333 U.S. 591, 607 (1948), the Court stated:

> "[The Tax Court] is the agency designated by law to find and examine the facts and to draw conclusions * * *. And it is well established that its decision is to be respected on appeal if firmly grounded in the evidence and if consistent with the law."

Accordingly, if deference to some agency is appropriate, then the choice, other things being equal, must be the Tax Court rather than the Commissioner.

In reaching a contrary conclusion, the court of appeals in the instant case relied essentially on a quotation from this Court's opinion in *United States* v. *Correll*, 389 U.S. 299, 306-07 (1967):

> "Alternatives to the Commissioner's * * * rule are of course available. Improvements might be imagined. But we do not sit as a committee of revision to perfect the administration of the tax laws. Congress has delegated to the Commissioner, not to the courts, the task of prescribing 'all needful rules and regulations for the enforcement' of the Internal Revenue Code. 26 U.S.C. § 7805(a). * * *"

That case is readily distinguishable, however, and the court of appeals erred in relying so heavily on the quoted words.[5] In *Correll*, the issue was the Commissioner's long standing policy that a taxpayer traveling on business

---

vant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact." 363 U.S. at 289.

[5] The *Correll* quotation in the court of appeals opinion continues: "In this area of limitless factual variations, 'it is the province of Congress and the Commissioner, not the courts, to make the appropriate adjustments.' *Commissioner* v. *Stidger*, 386 U.S. 287, 296." In *Stidger*, however, the Tax Court had upheld the Commissioner, so the quoted words do not express a preference for the Commissioner over the Tax Court.

may deduct the cost of his meals only if his trip requires him to stop for sleep or rest. The taxpayer paid the tax and sued successfully in the District Court. The Court of Appeals for the Sixth Circuit affirmed the judgment, but this Court reversed. The Court noted that the rule "avoided the wasteful litigation and continuing uncertainty that would inevitably accompany any purely case-by-case approach to the question of whether a particular taxpayer was 'away from home' on a particular day." 389 U.S. at 302. It found that the Commissioner had achieved "not only ease and certainty of application but also substantial fairness," 389 U.S. at 303, giving several examples of the advantages of the rule. It then noted that Congress certainly recognized, when it promulgated § 162(a)(2), that the Commissioner had interpreted its statutory predecessor in accordance with his practice, citing the hearings and reports in the legislative history of the 1954 Code. Only after all of these considerations had been set forth did the Court close with its general statement about deference to the Commissioner.

The instant case is very different. First, the alternative presented here is not between a flat rule that avoids litigation and uncertainty and a "case-by-case approach" (which the Court attributed to the Tax Court on the *Correll* issue). The Tax Court in this case did not insist on a case-by-case approach to home-office issues; it merely disapproved one attempt by the Commissioner to follow a particular rule. Since the Tax Court itself found it necessary to make various simplifying assumptions in deciding the case, there seems little question that the Court would look favorably on new attempts by the Commissioner to adopt reasonable rules for the calculation of the time attributable to the business use of space in residences. Nor is the Commissioner in a good position to argue against a more refined approach to the time-

allocation issue, when his own revenue ruling expressly endorses a flexible, case-by-case approach with regard to the space-allocation issue. See Revenue Ruling 62-180, the first paragraph quoted on page 5, *supra*. Even the time-allocation question requires inquiry into the particular facts, as the Commissioner admitted in his brief before the Court of Appeals (p. 12). Given the detailed factual inquiry that is already necessary under the Commissioner's own practices, the flat time-allocation rule at issue in this case does not add significantly to administrative efficiency. It is an anomaly in a rule that otherwise acknowledges the need for flexibility.

Second, the Court in *Correll* found that the rule achieved "substantial fairness." The Court of Appeals in this case did not expressly make such a finding; its opinion indicates that it did not find it necessary to make such a finding; and petitioners believe that no such finding would have been supportable. Under the Commissioner's own interpretation of the rule, if a den in an apartment is used exclusively for business purposes—three hours per day in the evening, for example—than all of the expenses attributable to that room are deductible. If, however, the room is used in addition one hour per day for recreation, then the percentage of expenses deductible drops from 100 percent to 12½ percent (3/24). As the Tax Court ruled, there is no justification for treating the den, when unoccupied, as "available" only for pleasure and not for business. The Commissioner appears to be concerned that home-office deductions are taken when the taxpayer incurs no added expense for business purposes. This consideration is mentioned, indeed, in the *Correll* case, 389 U.S. at 304, and the Commissioner has made it vivid by referring to the petitioners' use of the kitchen table in their first apartment. (Commissioner's brief below at 16.) In fact, the circumstances in this case support the notion that added expenses are often incurred. From their first apartment, which had only three rooms, the petitioners moved to first one, then another bigger apartment. Plainly, in moving their residences, taxpayers will make decisions about the space they need by taking into account their requirements for business purposes as well as their requirements for recreation or other personal uses. If the Commissioner is concerned about "kitchen table" cases, he can issue another ruling to cover minimal residential spaces in which it is unlikely that "business purposes" were a factor in the renting decision. There is no indication that the Tax Court would disapprove such an approach. It is unreasonable, however, for the Commissioner to treat one area of possible abuse as a reason for such a broad proscription of reasonable office-in-the-home expenses as he sought to apply here.[6]

Finally, this particular Commissioner's policy has neither the extensive history of that in *Correll*, nor the feature of intervening Congressional reenactment of the Code. This policy, embodied in a 1962 ruling and, it appears, often compromised by the Commissioner,[7] deserves

---

[6] The Tax Court, rather than the Commissioner, took to heart Justice Cardozo's words about the business expense deduction:

> "One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up in the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle."

Welch v. *Helvering*, 290 U.S. 111, 115 (1933).

[7] *E.g.*, *Gillis* v. *Commissioner*, 32 CCH Tax Ct. Mem. 429 (1973), where a home office, one-eighth of the space in the apartment, was found, with apparant acquiescence by the Commissioner, to have been used 80 percent for business and 20 percent for personal purposes, though the taxpayer used it for business only on weekday evenings.

little weight in comparison to the decision of the Tax Court.[8]

The question of the method of calculating office-in-home deductions is of great importance to many taxpayers of moderate means. The government, in its brief below, noted the importance of the issue to "millions of taxpayers" (p. 12).[9] These taxpayers are not likely to pursue litigation over the matter because the individual amounts at issue are small compared to legal expenses. These taxpayers, however, are entitled to the benefit of a fair and equitable construction of the general provisions of Sections 162(a) and 262 of the Code. The applicable Treasury Regulations are consistent with their position. Many taxpayers—particularly high school teachers, like petitioners in this case, and college teachers—find it necessary to carry on a substantial amount of their work-

[8] When the *Correll* quotation relied on by the court of appeals was recently cited by this Court, it was on the question of deference to the Treasury Regulations, not to a revenue ruling. *United States* v. *Cartwright*, 411 U.S. 546, 550 (1973). It is unlikely that the Court in *Correll* intended to alter the long-standing principle of tax law that although the Treasury Regulations are entitled to considerable weight in interpreting the Code, revenue rulings are entitled to little. *Bartels* v. *Birmingham*, 332 U.S. 126, 132 (1947); *Biddle* v. *Commissioner*, 302 U.S. 573, 582 (1938); *Helvering* v. *New York Trust Co.*, 292 U.S. 455, 468 (1934). See also Introduction, 1975-1 Cum. Bull. iii: "Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations * * *."

[9] A provision of the proposed tax reform bill, H.R. 10612, § 601, as passed by the House and as passed, with amendments, by the Senate, would disallow virtually all home-office deductions where the "office" is not used exclusively for business purposes. The Conference Committee has just reported its version of the bill, which, at the time of this writing, was not available. Although passage of the provision would put an end to further deductions of the kind precisely at issue in this case, deductions taken in tax years through the effective date of enactment would remain at issue for many years. And the issue of judicial review of disputes between the Tax Court and the Commissioner is of course a recurring question of general application.

related activities at home. Public schools, in particular, generally provide inadequate office space. If public school teachers have professional libraries at all, they are likely to have to keep them at home. The presence of the library at home then makes the home, in many ways, a more adequate working space than the school. Public school teachers who lack the office space at work that is often available to professionals in the private sector should not be disadvantaged by a niggardly construction of the general tax deduction provisions.

The United States Tax Court exists to provide taxpayers with an efficient, expert adjudicative body to hear their claims that the Commissioner has misconstrued the tax laws. The court of appeals neither gave nor could have given an adequate justification for overturning the Tax Court's decision that rejected the Commissioner's policy in this case. This Court should review the case on the merits to correct that error and deter lower courts from following the practice of deferring improprely to the Commissioner's position in federal tax cases.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted and the judgment of that court reviewed on the merits.

Respectfully submitted,

STEPHEN J. POLLAK
JOHN TOWNSEND RICH
LOUIS M. KAUDER
SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

STEPHEN M. NASSAU
1201 Sixteenth Street, N.W.
Washington, D.C. 20036

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

LAWRENCE B. TRYGSTAD
TRYGSTAD & ODELL
1880 Century Park East
Suite 517
Century City, California 90067

September 14, 1976

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-1484

GEORGE W. GINO and EMILIE R. GINO,
Plaintiffs-Appellees,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Defendant-Appellant.

[June 16, 1976]

Appeal from the United States Tax Court

OPINION

Before: DUNIWAY, CARTER and TRASK,
Circuit Judges

PER CURIAM:

The Commissioner of Internal Revenue (Commissioner) has appealed from an adverse decision of the Tax Court regarding a "home-office" deduction claimed by taxpayers. The opinion of the Tax Court is reported at 60 T.C. 304 (1973).[1]

---

[1] Two of the three unrelated issues in the Tax Court were resolved in favor of the Commissioner and were not appealed. This appeal concerns part 2 of the decision described therein as "Office-in-Home Expense."

The essential facts are not in dispute. Taxpayers, husband and wife, were high school teachers employed in the Los Angeles School System during the tax years in question, 1966, 1967 and 1968. In this period both performed non-classroom duties at home in connection with their employment. They spent about two hours each night, five days a week, preparing lesson plans, framing examination questions, grading papers and reading professional materials. They also stored their professional library and teaching materials in their home. During the years at issue they used a definite percentage of the space for business purposes, although the areas so occupied were not segregated but were also used for non-teaching activities.

On their returns they claimed specified amounts as expenses for an office-in-the-home. The Commissioner allowed a portion of the deductions, computing the deduction on the basis of a formula contained in Rev. Rul. 62-180, 1962-2 Cum. Bull. 52, example 5. The Tax Court rejected this formula and held instead that the deduction should be based upon the number of hours per day used for business purposes divided by the time the space was *actually* used for all purposes. Reliance was placed upon section 1.274-2(e)(4), of the Income Tax Regulations promulgated under 26 U.S.C. § 274 which provide for deductions of expenses for facilities used in connection with entertainment, amusement or recreation under limited circumstances.[2] The Tax Court interpreted that sec-

---

[2] Section 274 reads in pertinent part, that

"No deduction otherwise allowable under this chapter shall be allowed for any item—

. . .

"(B) . . . With respect to a facility used in connection with an activity referred to in subparagraph (A) [i.e., entertainment, amusement or recreation], unless the taxpayer establishes that the facility was used primarily for the furtherance of the taxpayer's trade or business . . . ."

tion to provide that the actual use and not the availability of use is to control in determining whether the primary use of transportation facilities, such as an automobile or airplane, or entertainment facilities, such as yacht or hunting lodge, is for business or personal purposes.

Here, however, we are not determining the primary use for the purpose of qualifying for the deduction but the portion of the use claimed for the purpose of computing the deduction itself. Nor are we concerned with expenditures for facilities used in connection with entertainment, amusement or recreation.

26 U.S.C. § 162 provides for the deduction of all ordinary and necessary business expenses paid during the taxable year in carrying on a trade or business. The limitations upon the deductibility of such expenditures is clarified by 26 U.S.C. § 262, providing that "Except as otherwise provided in this chapter, no deduction shall be allowed for personal, living, or family expenses." The appropriate regulation explaining the section is 1.262-1(b)(3).

> "Expenses of maintaining a household, including amounts paid for rent, water, utilities, domestic service, and the like are not deductible. A taxpayer who rents a property for residential purposes, but incidentally conducts business there (his place of business being elsewhere) shall not deduct any part of the rent. If, however, he uses part of the house as his place of business, such portion of the rent and other similar expenses as is properly attributable to such place of business is deductible as a business expense."

The Internal Revenue Service has issued Rev. Rul. 62-180, 1962-2 Cum. Bull. 52 in order to illustrate and apply this regulation. It provides that if an individual

uses a room in his residence for business purposes "on a regular basis" but also uses it for personal affairs, an allocation is required based on the number of hours per day of actual business use over the number of hours per day during which the room is available for all uses. An example, followed by the Commissioner and rejected by the Tax Court, relates closely to the situation here.[3]

Admittedly any rule is an accommodation which attempts to fairly credit the taxpayer with a proper deduction while protecting the treasury in its responsibility to collect necessary tax revenues. Where a revenue ruling has been published by the Internal Revenue Service for

---

[3] Example 5, 1962-2 Cum. Bull. provides:

"As a condition of his employment, *E*, an outside salesman, is required to do his clerical work on his own time and away from the company office. He does the work at his residence which he rents. He must do his work on a regular basis in order to keep his orders current. He uses the den as an office. The den is also available for family use. He uses the den for business purposes an average of two hours per day. Therefore, two twenty-fourths of the expense allocable to the den is deductible as business expenses. The den is 10 x 15 feet and the total area of the house is 2,000 square feet. Therefore, 7.5 percent (150/2,000) of the expenses is allocable to the den.

"*E*'s electric bill for the year was $100 of which $60 is attributable to lighting; $40 is attributable to purely personal uses and is not deductible. *E* spent $285 for oil. Of this amount $250 is attributable to heating his residence; $35 is attributable to purely personal uses and is not deductible.

"The allowable deduction from gross income in computing adjusted gross income, for the portion of the expenses attributable to the business use of the den, is computed as follows:

Light	$ 60.00
Heat	250.00
Rent	2,400.00
Total	$2,710.00
Expenses attributable to the den (7.5% of $2,710.00)	$ 203.25
Expenses attributable to business use of den (2/24 of $203.25)	$ 16.94"

the purpose of solving this particular problem, such as the ruling relied upon here by appellant, considerations of fair and effective administration of the tax law persuade us to the Commissioner's view, particularly in a close case. As the Supreme Court said in *United States* v. *Correll*, 389 U.S. 299, 306-07 (1967):

> "Alternatives to the Commissioner's . . . rule are of course available. Improvements might be imagined. But we do not sit as a Committee of revision to perfect the administration of the tax laws. Congress has delegated to the Commissioner, not to the courts, the task of prescribing 'all needful rules and regulations for the enforcement' of the Internal Revenue Code, 26 U.S.C. § 7805(a). In this area of limitless factual variation, 'it is the province of Congress and the Commissioner, not the courts, to make the appropriate adjustments.' *Commissioner* v. *Stidger*, 386 U.S. 287, 296. The role of the judiciary in cases of this sort begins and ends with assuring that the Commissioner's regulations fall within his authority to implement the congressional mandate in some reasonable manner."

We are persuaded that the better course is to follow the rule established by the Commissioner. The decision of the Tax Court is reversed.

APPENDIX B

UNITED STATES TAX COURT

* * * * *

GEORGE W. GINO AND EMILIE GINO,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 1676-71

Filed May 31, 1973.

* * * * *

FINDINGS OF FACT AND OPINION

HALL, *Judge*: Respondent determined deficiencies in petitioners' Federal income taxes as follows:

Year	*Deficiency*
1966	$1,446.50
1967	652.56
1968	484.68
Total	2,583.74

The issues for decision are the following: [1]

(1) Are petitioners entitled to deduct as an educational expense all or any part of the cost of their around-the-world trip taken in the summer of 1966?

[1] The parties now agree that petitioners are entitled to a $1,500 deduction for summer study in Maine during 1967 and rental losses of $130 and $2,452 for 1967 and 1968, respectively. In addition, respondent now concedes that petitioners are entitled to some office-in-home expenses, but in lesser amounts than deducted on their returns for 1966, 1967, and 1968.

(2) What is the amount of the deduction to which petitioners are entitled in 1966, 1967, and 1968 for business use of their home?

(3) Are petitioners entitled to a deduction for non-reimbursed educational and miscellaneous expenses in excess of the amounts allowed in the notices of deficiency for 1966, 1967, and 1968?

GENERAL FACTS

Some of the facts have been stipulated and are found accordingly.

Petitioners, husband and wife, resided in Marina del Rey, Calif., when they filed their petition herein. They timely filed their joint Federal income tax returns for the years 1966, 1967, and 1968 with the district director of internal revenue at Los Angeles, Calif.

1. *Around-the-World Trip*

FINDINGS OF FACT

During the years in issue, petitioners were high school teachers employed by the Los Angeles City school system. Both held general teaching credentials and each had about 10 years of teaching experience.

During 1966, 1967, and 1968 petitioner George Gino (George) taught driver education and training at Granada Hills High School. The driver education course, as taught by George, consisted of six major units and lasted about 10 weeks. The course was broken down as follows:

Subject matter	*Length of time spent*	*Subject matter*	*Length of time spent*
Introduction	1½ weeks	Alcohol and drugs	1 week
Psychology of the driver	2 weeks	Natural laws	1 week
Eyes of the driver	1 week	Vehicle code	3½ weeks

During the introduction, George emphasized the economic importance of the car in our society. Attitude of the driver toward various traffic conditions confronting him was emphasized in "psychology of the driver." "Eyes of the driver" was devoted to the anatomy of the eye, and the student was made aware of eye-related physiological phenomena experienced while driving. The effects of drugs and alcohol on driving were taught in that portion of the course so named. The roles of gravity, friction, centrifugal force, inertia, and force of impact were explained and discussed during the "natural law" segment of the course. The final unit of the course was a study of the California Vehicle Code.

George has long had a strong interest in traffic engineering and also the development of alternatives to the automobile as a means of transportation.

During 1966, 1967, and 1968 petitioner Emilie Gino (Emilie) taught physics, modern science, and biology at Washington and Venice High Schools. The science courses taught by Emilie were the basic high school courses offered by the Los Angeles City school system to 11th and 12th grade students.

The physics course consisted of the study of matter, measurement, mechanics of liquids, mechanics of gases, force, motion, machines, heat, electricity, sound, light, spectroscopy, radio, electronics, atomic energy, and cosmic rays. The modern science course covered applied chemistry, modern materials, man and machines, heat and fuels, nuclear energy, sound, light, electricity, electronics, and space. The biology course was devoted to the study of plants and animals.

During the summer of 1966 petitioners took a 72-day trip around the world. The itinerary of their trip took them to:

Place	*Date*	*Place*	*Date*
Honolulu	6/22—6/23	Zurich-W. Berlin	7/30—7/31
Honolulu-Tokyo	6/24—6/25	W. Berlin-E. Berlin	8/1 —8/2
Tokyo	6/26—6/27	Moscow-Leningrad	8/3 —8/4
Tokyo-Osaka	6/28—6/29	Helsinki	8/5 —8/6
Hong Kong	6/30—7/5	Stockholm	8/7 —8/8
Bangkok	7/6 —7/7	Stockholm-Smedstva, Norway	8/9 —8/10
New Delhi	7/8 —7/9	Trondheim-Oslo	8/11—8/12
Kathmandu, Nepal	7/10—7/11	Copenhagen	8/13—8/14
New Delhi-Cairo	7/12—7/13	Copenhagen-Rotterdam	8/15—8/16
Jerusalem	7/14—7/15	Rotterdam-Amsterdam	8/17—8/18
Beirut	7/16—7/17	Amsterdam-Brussels	8/19—8/20
Athens	7/18—7/19	Brussels	8/21—8/22
Belgrade	7/20—7/21	Luxembourg-Paris	8/23—8/24
Rome	7/22—7/25	Paris	8/25—8/26
Zurich	7/26—7/27	London	8/27—8/30
Chamonix, France—Switzerland	7/28—7/29	London-Boston	8/31—9/1

Prior to the trip, George had not attempted to correspond with any foreign motor vehicle authorities or to arrange any appointments with foreign officials. George did not attempt to secure information from local consulates of the various countries visited in order to secure assistance in determining the location and identity of the responsible foreign officials. He was able to locate the motor vehicle regulatory agency in 8 of the 24 countries he visited.

During the trip, petitioners visited a school in Japan that was in session, another in Thailand that was also in session, and one in Norway that was not in session. Petitioners toured the American University of Beirut, Lebanon. They did not visit any other major European universities, nor did they attend lectures or seminars relating to the courses they taught. The only lectures they heard were those any tourist would hear if he visited the particular facility then being visited by petitioners.

Petitioners kept a diary, took movies, and obtained written materials. The movies and written materials were used in their classrooms.

The Los Angeles City school system has an "in-service education program" granting teachers an opportunity to obtain salary point credits for approved travel. The maximum salary points allowed for approved summer travel is 6 points. One point is the equivalent of 1 semester of college credit. Upon acquiring 14 points a teacher moves into a higher salary grade. In addition, teachers get in-grade raises for each year of teaching experience. The board of education does not require personnel to engage in approved travel in order to retain salary, status, or employment. As a result of their around-the-world trip, each petitioner received 6 salary points from the board of education.

On their 1966 tax return, petitioners claimed a $5,500 deduction for employee business expenses arising from the around-the-world trip as follows:

Transportation expenses	$3,500
Meals and lodging	2,000
Other	500
Minus $500 for pleasure	(500)
Total travel expenses	5,500

Petitioners claimed an additional $975 during trial as expenses related to their 1966 trip. This additional amount is an estimate and petitioners presented no details or independent proof of these expenses.

OPINION

Petitioners contend that their 72-day around-the-world trip taken in the summer of 1966 was undertaken by them primarily to maintain and improve their job skills and was directly related to their trade or business. Sec.

162(a);[2] sec. 1.162-5, Income Tax Regs. Respondent asserts that the trip was a personal expense and therefore not deductible. Sec. 262.

For 72 days in the summer of 1966 petitioners journeyed around the world visiting Hawaii, Japan, Hong Kong, Thailand, India, Nepal, Egypt, Jordan, Lebanon, Greece, Yugoslavia, Italy, Switzerland, both East and West Germany, Russia, Finland, Sweden, Norway, Denmark, the Netherlands, Belgium, France, and England. Petitioners' travel expenses incurred on their around-the-world trip are deductible under section 162(a) only if they constitute ordinary and necessary business expenses. Section 1.162-5, Income Tax Regs., governing the deductibility of a taxpayer's educational expenses, which was in force during 1966 and 1967 was promulgated in 1958 by T.D. 6291.[3] In 1967 revised regulations section 1.162-

[2] All Code references are to the Internal Revenue Code of 1954 as in effect during the years in issue.

[3] T.D. 6291 (Apr. 5, 1958) provides in part as follows:

Sec. 1.162-5 Expenses for education.

(a) Expenditures made by a taxpayer for his education are deductible if they are for education (including research activities) undertaken primarily for the purpose of:

(1) Maintaining or improving skills required by the taxpayer in his employment or other trade or business, or

(2) Meeting the express requirements of a taxpayer's employer, or the requirements of applicable law or regulations, imposed as a condition to the retention by the taxpayer of his salary, status or employment.

Whether or not education is of the type referred to in subparagraph (1) of this paragraph shall be determined upon the basis of all the facts of each case. * * *

* * * *

(c) In general, a taxpayer's expenditures for travel (including travel while on sabatical leave) as a form of education shall be considered as primarily personal in nature and therefore not deductible.

(d) If a taxpayer travels away from home primarily to obtain education the expenses of which are deductible under this section, his expenditures for travel, meals, and lodging while away from

5 was promulgated by T. D. 6918.[4] These new regula-

home are deductible. However, if as an incident to such trip the taxpayer engages in some personal activity such as sightseeing, social visiting or entertaining, or other recreation, the portion of the expenses attributable to such personal activity constitutes nondeductible personal or living expenses and is not allowable as a deduction. If the taxpayer's travel away from home is primarily personal, the taxpayer's expenditures for travel, meals and lodging (other than meals and lodging during the time spent in participating in deductible educational pursuits) are not deductible. Whether a particular trip is primarily personal or primarily to obtain education the expenses of which are deductible under this section depends upon all the facts and circumstances of each case. An important factor to be taken into consideration in making the determination is the relative amount of time devoted to personal activity as compared with the time devoted to educational pursuits. Expenses in the nature of commuters' fares are not deductible.

[4] T.D. 6918 (May 1, 1967) provides in part as follows:

Sec. 1.162-5 Expenses for education.

(a) *General rule.*—Expenditures made by an individual for education * * * are deductible as ordinary and necessary business expenses (even though the education may lead to a degree) if the education—

(1) Maintains or improves skills required by the individual in his employment or other trade or business, or

(2) Meets the express requirements of the individual's employer, of the requirements of applicable law or regulations, imposed as a condition to the retention by the individual of an established employment relationship, status, or rate of compensation.

* * * *

(d) *Travel as a form of education.*—Subject to the provisions of paragraph (b) and (c) of this section, expenditures for travel (including travel while on sabatical leave) as a form of education are deductible only to the extent such expenditures are attributable to a period of travel that is directly related to the duties of the individual in his employment or other trade or business. For this purpose, a period of travel shall be considered directly related to the duties of an individual in his employment or other trade or business only if the major portion of the activities during such period is of a nature which directly maintains or improves skills required by the individual in such employment or other trade or business. The approval of a travel program by an employer or the fact that travel is accepted by an employer in the fulfillment of its requirements for retention of rate of compensation, status or em-

tions are effective for taxable years beginning on or after January 1, 1968, but for prior years taxpayers may rely on either the 1958 or the 1967 regulations. Rev. Rul. 68-191, 1968-1 C.B. 67.

For petitioners to satisfy the requirements of the 1958 regulations, they must establish both that the primary purpose of their travel was to maintain or improve required skills and that their travel was of such a nature as to maintain or improve skills. The 1967 regulations remove the subjective requirement of primary purpose and therefore are more favorable to petitioners. If petitioners fail to satisfy the test for deductibility under the new regulations, *a fortiori*, they fail under the old regulations. Accordingly, in fairness to petitioners, we apply the new regulations in this case. *Stanley Marlin*, 54 T.C. 560, 563-565 (1970).

Under the 1967 regulations, deductibility of petitioners' travel expenses turns on the factual question whether a major portion of the activities in which they engaged during their around-the-world trip was of such a nature as directly to maintain or improve skills required by each of them in their employment. Sec. 1.162-5, Income Tax Regs. (1967).

We find that both petitioners' activities on this trip were not materially different from those reasonably expected of any other tourists their age on a sightseeing trip abroad. *Dennehy* v. *Commissioner*, 309 F. 2d 149 (C.A. 6, 1962), affirming a Memorandum Opinion of this Court. They visited volcanoes in Hawaii, the Imperial Gardens in Tokoya, the Taj Mahal in India, the Acropolis in Athens, the Vatican in Rome, the Van Hoppes diamond factory in Amsterdam, the Eiffel Tower

ployment, is not determinative that the required relationship exists between the travel involved and the duties of the individual in his particular position.

in Paris, and Westminster Abbey in London. Petitioners also engaged in general sightseeing in Tokyo, Rome, East Berlin, Copenhagen, Moscow, Norway, and Paris.

During the trip George Gino, a driver education teacher in the Los Angeles City school system, observed world traffic problems and made inquiries about the vehicle codes and licensing requirements of some of the foreign countries he visted. He testified he had a keen interest in traffic engineering and solutions to traffic congestion. In this connection, he took a ride on the high-speed train between Tokyo and Osaka and drove through the Mont Blanc Tunnel. George further testified he has shown his classes movies taken on this trip, and that he has been able to better motivate his students' interest in driver education by relating his travel experiences to them.

The primary skill required by George in his employment as a teacher of driver education in Granada Hills High School is the ability to teach his students the California Vehicle Code, the natural forces affecting the operation of a car, the enervating effects of drugs and alcohol upon a driver, and the development of a defensive attitude toward driving. That he was able to enliven his course through discussions of world traffic problems and the vehicle codes and licensing requirements of various foreign countries at best is only incidental to educating and training new California drivers. We find that George's activities on this trip did not directly maintain and improve skills required of him as a driver education teacher within the purview of the regulations.

George's wife Emilie, a science teacher in the Los Angeles City school ssytem, visited one high school physics class in Tokyo and one high school science class in Bangkok on this trip. She also visited the Atomium in Brussels, but there she heard only those lectures heard by visiting tourists. She testified that she observed the scientific ramifications of a chance typhoon in Tokyo, land

reclamation in Hong Kong, the salinity of the Dead Sea in Jerusalem, the weathering of the Acropolis in Athens, farm conditions in Yugoslavia, and the Eiffel Tower in Paris. Emilie further testified that she tells her students about things she observed on this trip and, in addition, has shown her students movies taken during the course of the trip. She also testified that she has experienced increased rapport with her foreign-born students as a result of her travel experiences.

The primary skill required by Emilie in her employment as a high school science teacher is the ability to teach a tremendous volume of basic scientific material in the areas of physics, modern science, and biology. Emilie visited only one physics class and one other science class during the entire trip. She did not visit the science faculties of any universities, nor did she attend any lectures given by any biologists, chemists, or physicists.

As in George's case, we find that Emilie's activities on this trip did not directly maintain and improve skills required of her as a science teacher within the purview of the regulations. Emilie's increased rapport with her foreign-born students is not a sufficient reason to sustain the business nature of the trip. *Fugate* v. *United States*, 259 F. Supp. 398 (W.D. Tex. 1966).

Furthermore, the trip was not required by petitioners' employer, the Los Angeles Board of Education, in order for petitioners to retain their salary, status, or employment. Petitioners' receipt of salary point credits from the board is not decisive. The regulations state that "approval of a travel program by an employer or the fact that travel is accepted by an employer in the fulfillment of its requirements for retention of rate of compensation, status or employment, is not determinative that the required relationship exists between the travel involved and the duties of the individual in his particular position." Sec. 1.162-5(d), Income Tax Regs. (1967).

Finally, during the trial, petitioners claimed additional travel expenses beyond those set forth in their 1966 Federal income tax return. These expenses were totally unsubstantiated and based only on estimates. Even if their trip had been a business trip, and we have held it was not, petitioners have failed to meet the substantiation requirements of section 274(d).

2. *Office-in-Home Expense*

FINDINGS OF FACT

During 1966, 1967, and 1968, both petitioners performed non-classroom duties at home in connection with their employment. Petitioners each spent approximately 2 hours a night, 5 days a week, on preparation of lesson plans, preparing and grading of examinations, and reading of professional materials. In addition, part of their home was used for the storage of their professional library, consisting of over 200 books, and other teaching materials.

From January 1966 through October 1967, petitioners lived in an apartment which they rented for $185 per month. This apartment consisted of a bedroom, living room, and kitchen. Petitioners used 20 percent of the space of this apartment (including the dining room table in the living room and the kitchen table) in connection with their teaching activities. Utilities, exclusive of telephone, were $20 per month throughout this period.

From November 1967 through May 1968, petitioners lived in a condominium which they rented for $300 per month. This condominium consisted of a bedroom, living room, dining area, kitchen, and den. Petitioners used 25 percent of the space of this condominium in connection with their teaching activities. Utilities, exclusive of telephone, were $25 per month for this period.

From June 1968 through December 1968, petitioners lived in a condominium which they purchased. This condominium consisted of two bedrooms, a living room, dining area, kitchen and den. Petitioners used 33⅓ percent of the space of this condominium in connection with their teaching activities.

On their 1966, 1967, and 1968 returns, petitioners claimed $500, $630, and $1,000, respectively, as office-in-home expenses. Respondent initially disallowed the entire deduction. However, in his brief respondent allowed part of the office-in-home deductions claimed by petitioners, and disallowed the remainder as excessive.

Respondent computed the allowed deduction for each year as follows:

1966		
Utilities (12 months @ $20/month)	$ 240.00	
Rent (12 months @ $185/month)	2,220.00	
Total	2,460.00	
Expenses attributable to 20 percent space use (20 percent of $2,460)	492.00	
Expenses attributable to business use of space (2/24 [1] of $492)		$41.00
1967		
January through October:		
Utilities (10 months @ $20/month)	200.00	
Rent (10 months @ $185/month)	1,850.00	
Total	2,050.00	

[1] The "2" in "2/24" represents the number of hours per day that petitioners used their home for business purposes.

Expenses attributable to business use of space use (20 percent of $2,050)	410.00	
November and December:		
Utilities (2 months @ $25/month)	50.00	
Rent (2 months @ $300/month)	600.00	
Total	650.00	
Expenses attributable to 25 percent space use (25 percent of $650)	162.50	
Expenses attributable to business use of space (2/24 of $162.50)		13.54
Total		47.71

1968

January through May:		
Utilities (5 months @ $25/month)	$ 125.00	
Rent (5 months @ $300/month)	1,500.00	
Total	1,625.00	
Expenses attributable to 25 percent space use (25 percent of $1,625)	406.25	
Expenses attributable to business use of space (2/24 of $406.25)		$33.85
June through December:		
Utilities (7 months @ $25/month)[2]	175.00	
Rent and/or depreciation[3]	0	
Total	175.00	

[2] The record is silent with respect to the cost of utilities for this period. Respondent allowed $25 per month for utilities from January through May.

[3] The record is devoid of any evidence which could be used to establish a basis for determining a depreciation rate.

Expenses attributable to 33 1/3 space use (33 1/3 percent of $175)	58.33	
Expenses attributable to business use of space (2/24 of $58.33)		4.86
Total		38.71

OPINION

Both parties agree that petitioners are entitled to a deduction for business use of their home pursuant to section 162(a). The parties have stipulated the percentages of the space of petitioners' various residences that was used for their teaching activities. However, the amount that petitioners are entitled to deduct for this expense remains to be decided. Petitioners contend that they are entitled to deduct $500, $630, and $1,000 for 1966, 1967, and 1968, respectively. Respondent, on the other hand, contends that petitioners are entitled to deduct only $41, $47.71, and $38.71 for 1966, 1967, and 1968, respectively.

Petitioners have the burden of proving the amount of the expenses incurred for maintaining their residences and the portion thereof that is properly allocable to business use. Rule 32, Tax Court Rules of Practice. The parties stipulated the amount of the expenses incurred in connection with the rented apartment and the rented condominium, as well as the percentage of the total area of each residence used for business purposes. However, there is no evidence in the record with respect to either the cost of utilities at the purchased condominium or the cost or useful life of the depreciable portion of that residence. The respondent in his brief allowed $25 per month for utilities at the purchased condominium, and under *Cohan* we agree with that amount. *Cohan* v. *Commissioner*, 39 F.2d 540 (C.A. 2, 1930). However, no depreciation is allowable on account of the purchased con-

dominium because there is no evidence in the record on which to make a determination or even an estimate of allowable depreciation.

Petitioners must prove not only what part of the residence was used for business purposes, but also the portion of time it was so used. This Court, in *International Artists, Ltd.*, 55 T.C. 94, 107 (1970), acq. 1971-2 C.B. 3, was called upon to allocate the depreciation and maintenance expenses of a large house between business and personal use. Taxpayer, entertainer Liberace, lived in the house and also conducted some of his business on the premises. In addition, the house stood empty for long periods of time during which Liberace was away from Los Angeles. Respondent there contended that 1/6 of the house was used 20 percent of the time for business purposes. Respondent, apparently relying on Rev. Rul. 62-180, 1962-2 C.B. 52, arrived at the 20-percent figure by the method presented in that ruling, i.e., comparing the days of business use of the premises with the total number of days available for both business and personal use. The Court found instead that the relevant period in determining the comparative business and personal use of the house was the total period of actual use of the premises while Liberace was present in Los Angeles. Likewise, in section 1.274-2(e)(4), Income Tax Regs., in determining whether the primary use of certain transportation facilities (such as an automobile or airplane) or entertainment facilities (such as a yacht, hunting lodge, vacation cottage, country club, etc.) is for business or personal purposes, "it is the *actual use* of the facility which establishes the deductibility of expenditures with respect to the facility; not its *availability for use.*" (Emphasis added.)

In this case we hold that the proper ratio to apply is the ratio of hours of business use to hours of total use of the rooms in issue in petitioners' apartment or con-

dominium. Respondent's contention notwithstanding, we do not apply the ratio of hours of business use to hours in the day. We disagree with the following portion of respondent's Rev. Rul. 62-180, 1962-2 C.B. 52, 54: "Where a portion of the residence is regularly used for business purposes only part of the time, a further allocation must be made on the basis of the ratio of the time the area is actually used for business purposes to the *total time it is available for all uses.*" (Emphasis added.)[5] The obvious difficulty with an allocation of business use as a percentage of total hours of availability for use rather than total hours of use, is the erroneous and distorting assumption that a dual-use facility is not, when unused, just as much available for business as it is for nonbusiness use. The correct rule is to prorate in proportion to actual use, in the manner specified in regulations section 1.274-2(e)(4), without the thumb on the scales provided by the allocation to personal use of all hours of nonuse.

Petitioners have testified that the living room and kitchen in the apartment, and presumably the living room, dining room, and den in the condominiums were regularly used for their teaching activities. However these areas were also regularly used for nonteaching activities. Petitioner George Gino estimated, and we have

---

[5] This Court's reliance on Rev. Rul. 62-180 in the unreported decision, *Martha Henderson*, T.C. Memo. 1968-22, is not inconsistent herewith since in *Henderson* the taxpayer, who worked at home, spent substantially all her time, for all that appeared in the record, in the one-room "efficiency" apartment where she lived. Under such circumstances the apartment was in use, either for business or personal purposes, substantially all the time, and the Rev. Rul. 62-180 allocation method reaches the same result as the method we have herein applied. We do not agree with the unreported case of *Horatio C. Hoggard III* v. *United States* (E.D. Va. 1967, 20 A.F.T.R. 2d 5805, 67-2 U.S.T.C. par. 9741) to the extent it applies the above-quoted portion of Rev. Rul. 62-180.

found that he and his wife together used the residence "a couple of hours a night" for teaching-related activities. The record shows that both petitioners held full-time teaching jobs, and presumably they were away from home at least 8 hours a day on working days during which time the residence was not used for either business or personal reasons. Presumably petitioners occupied the bedrooms for another approximately 8 hours at night. It would seem therefore that the "work areas" were actually in use not more than some 8 hours a day. Therefore, even under the *Cohan* rule, a more reasonable fraction to apply is 2/8 rather than the 2/24 employed by the respondent. Based on all the facts and circumstances, taking into account weekends, holidays, and vacations on which the testimony was imprecise on the one hand, and the use of part of the apartment and condominiums for permanent storage of work-connected materials on the other, we hold that 25 percent of the housing costs allocable to the work-at-home areas is deductible. We recognize that allocations of this type are necessarily imprecise, but they are required if justice is to be served. *Cohan* v. *Commissioner, supra.*

3. *Miscellaneous and Educational Expenses*

FINDINGS OF FACT

In their 1966, 1967, and 1968 returns, petitioners claimed as educational and miscellaneous expenses the amounts of $200, $400, and $600, respectively. Respondent allowed $119, $128, and $117 for those years, respectively, and disallowed the remainder for lack of substantiation. These disallowed amounts consisted of an adding machine, a movie projector, and incidental expenditures for paper, pens, folders, and stencils.

OPINION

Petitioners claim they are entitled to deduct for miscellaneous and educational expenses the amounts of $200, $400, and $600 for 1966, 1967, and 1968, respectively. Respondent contends they are entitled to deduct only $119, $128, and $117 for those years, respectively, on the grounds petitioners have failed to substantiate any greater amounts.

Petitioners have offered no evidentiary substantiation, beyond their estimates, for any amounts in excess of the amounts allowed in each year by respondent. Petitioners did not maintain a written record of purchases of work-related materials. In either 1967 or 1968, petitioners could not remember which year, a projector and an adding machine were acquired. George thought the projector cost $130 and Emilie thought it cost $175. The useful life of neither the projector nor the adding machine was established. The parties testified that both machines were used approximately 50 percent of the time in connection with their teaching activities.

In view of petitioners' vague and inconsistent testimony, which would for the most part tend to establish a capital expenditure rather than a business expense, we hold that petitioners have not met their burden of proof in establishing that any of these additional amounts, in addition to the amounts allowed by respondent, is allowable as a business expense for any of the years in issue.

Decision will be entered under Rule 50.

APPENDIX C

Treasury Regulations, § 1.274-2 *Disallowance of deductions for certain expenses for entertainment, amusements, or recreation.*

(a) *General rules*—• • •

• • • • •

(2) *Entertainment facilities.* Except as provided in this section, no deduction otherwise allowable under chapter 1 of the Code shall be allowed for any expenditure with respect to a facility used in connection with entertainment unless the taxpayer establishes—

(i) That the facility was used primarily for the furtherance of the taxpayer's trade or business, and

(ii) That the expenditure was directly related to the active conduct of such trade or business.

Such deduction shall not exceed the portion of the expenditure directly related to the active conduct of the taxpayer's trade or business.

• • • • •

(e) *Expenditures with respect to entertainment facilities*—(1) *In general.* Any expenditure with respect to a facility used in connection with entertainment shall not be allowed as a deduction except to the extent it meets the requirements of paragraph (a) (2) of this section.

• • • • •

(4) *Determination of primary use*—(i) *In general.* A facility used in connection with entertainment shall be considered as used primarily for the furtherance of the taxpayer's trade or business only if it is established that the primary use of the facility during the taxable year was for purposes considered ordinary and necessary within the meaning of sections 162 and 212 and the regulations thereunder. All of the facts and circumstances

of each case shall be considered in determining the primary use of a facility. Generally, it is the actual use of the facility which establishes the deductibility of expenditures with respect to the facility; not its availability for use and not the taxpayer's principal purpose in acquiring the facility. Objective rather than subjective standards will be determinative. If membership entitles the member's entire family to use of a facility, such as a country club, their use will be considered in determining whether business use of the facility exceeds personal use. The factors to be considered include the nature of each use, the frequency and duration of use for business purposes as compared with other purposes, and the amount of expenditures incurred during use for business compared with amount of expenditures incurred during use for other purposes. No single standard of comparison, or quantitative measurement, as to the significance of any such factor, however, is necessarily appropriate for all classes or types of facilities. For example, an appropriate standard for determining the primary use of a country club during a taxable year will not necessarily be appropriate for determining the primary use of an airplane. However, a taxpayer shall be deemed to have established that a facility was used primarily for the furtherance of his trade or business if he establishes such primary use in accordance with subdivision (ii) or (iii) of this subparagraph. Subdivisions (ii) and (iii) of this subparagraph shall not preclude a taxpayer from otherwise establishing the primary use of a facility under the general provisions of this subdivision.

(ii) *Certain transportation facilities.* A taxpayer shall be deemed to have established that a facility of a type described in this subdivision was used primarily for the furtherance of his trade or business if—

(a) Automobiles. In the case of an automobile, the taxpayer establishes that more than 50 percent of mileage

driven during the taxable year was in connection with travel considered to be ordinary and necessary within the meaning of section 162 or 212 and the regulations thereunder.

(b) Airplanes. In the case of an airplane, the taxpayer establishes that more than 50 percent of hours flown during the taxable year was in connection with travel considered to be ordinary and necessary within the meaning of section 162 or 212 and the regulations thereunder.

(iii) *Entertainment facilities in general.* A taxpayer shall be deemed to have established that—

(a) A facility used in connection with entertainment, such as a yacht or other pleasure boat, hunting lodge, fishing camp, summer home or vacation cottage, hotel suite, country club, golf club or similar social, athletic, or sporting club or organization, bowling alley, tennis court, or swimming pool, or,

(b) A facility for employees not falling with the scope of section 274(e)(2) or (5)

was used primarily for the furtherance of his trade or business if he establishes that more than 50 percent of the total calendar days of use of the facility by, or under authority of, the taxpayer during the taxable year were days of business use. Any use of a facility (of a type described in this subdivision) during one calendar day shall be considered to constitute a "day of business use" if the primary use of the facility on such day was ordinary and necessary within the meaning of section 162 or 212 and the regulations thereunder. For the purposes of this subdivision, a facility shall be deemed to have been primarily used for such purposes on any one calendar day if the facility was used for the conduct of a substantial and bona fide business discussion (as defined in paragraph (d)(3)(i) of this section notwithstanding that the

facility may also have been used on the same day for personal or family use by the taxpayer or any member of the taxpayer's family not involving entertainment of others by, or under the authority of, the taxpayer.

* * * * *

APPENDIX D

UNITED STATES TAX COURT

Docket No. 1676-71

GEORGE W. GINO and EMILIE R. GINO,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the opinion of the Court filed May 31, 1973, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there are deficiencies in income taxes due from the petitioners for the taxable years 1966, 1967 and 1968 in the amounts of $1,416.00, $371.00 and $412.00, respectively.

/s/ Cynthia Holcomb Hall
Judge

Entered: Oct.1, 1973

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-1484
DC #1676-71

GEORGE W. GINO and EMILIE R. GINO,
Plaintiffs-Appellees,

v.

COMMISSIONER OF INTERNAL REVENUE,
Defendant-Appellant.

JUDGMENT

Upon Petition to Review a Decision of The Tax Court of the United States,

This Cause came on to be heard on the Transcript of the Record from The Tax Court of the United States, and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Decision of the said Tax Court of the United States in this Cause be, and hereby is reversed with costs in this court in favor of the appellant and against the appellee in the amount of $66.00.

Cost of printing briefs $66.00

Filed and entered June 16, 1976